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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

Number [redacted] 184

VERNON GRANT

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR CERTIORARI

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Atlanta 3, Georgia

IN THE

Supreme Court of the United States

October Term, 1962

Number _____

VERNON GRANT

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vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR CERTIORARI

Now comes Vernon Grant, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner Vernon Grant was jointly indicted with Frank A. Powers, Jr. and Harold Johnson on a three

count indictment charging in the first count the offense of conspiracy to violate Section 1705 (a), Title 26, U.S.C.A., relating to the selling of narcotic drugs "not in pursuance of the written orders of the persons to whom said narcotic drugs were to be sold, on forms issued in blank for that purpose by the United States Secretary of the Treasury, or his delegate," and charging in the second count the substantive offense contained in the same Section, alleging the sale to Russell L. Jessup. The third count was not applicable to the Petitioner, and did not name him as a defendant.

Petitioner was tried jointly with Harold Johnson on the first two counts, and was found guilty by the jury, and sentenced by the court to serve five (5) years in the custody of the Attorney General.

The evidence for the Government was substantially as follows: Russell L. Jessup was employed as an undercover agent for the Government, (R. 18). On January 2, 1961 he was introduced to Harold Johnson at a bar in Atlanta. Jessup told Johnson he had heard that he had some narcotics for sale. Johnson told him he knew a man who did have. Later Johnson introduced Jessup to Vernon Grant. They made a deal for the sale of narcotics, (R. 19). Later on, after certain negotiations, Jessup paid Petitioner $500.00, and in turn the Petitioner turned over to Jessup a bottle containing 495 morphine sulphate tablets, quarter grain each, (R. 27 & 77, and U. S. Ex #1). There were no other witnesses to the actual transaction. Petitioner and co-defendant Harold Johnson both took the stand and denied the transaction.

As to the allegations contained in both counts one and two of the indictment that the sale of the narcotic drugs were "not in pursuance of a written order form

of the said Russell L. Jessup on a form issued in blank for that purpose by the United States Secretary of the Treasury or his delegate," the only evidence offered by the Government in the record was the following question and answer by the witness Jessup, and is contained on page 30 of the Record as follows:

"Q. All right. Now, when you obtained this bottle from Vernont Grant and Harold Johnson, did you give them an order signed by the Secretary of the Treasury or his delegate?

A. No sir, I did not."

At the conclusion of the evidence for the Government counsel for the Petitioner made a motion for a judgment of acquittal on the ground there was not "competent and sufficient legal evidence to go to the jury." (R. 82). This motion was overruled by the court, and at the conclusion of all the evidence in the case it was renewed.

Character evidence was offered by the Petitioner, and after the argument of counsel and charge of the court the Petitioner was found guilty on both counts one and two.

The sole basis for the appeal in the Court of Appeals for the Fifth Circuit was the fact that the evidence was not sufficient to support the verdict, in that the Government failed to prove that the narcotic drugs were not "in pursuance of a written order of the person to whom such article is sold on a form to be issued in blank for that purpose by the Secretary or his delegate," as is required by the statute under which the petitioner was convicted of violating.

The Court of Appeals affirmed the conviction on the ground that no motion was made at the conclusion of

the entire trial for a verdict of acquittal on a basis of the failure of the government to introduce evidence sufficient to carry the case to the jury.

A petition for rehearing was filed and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on March 29, 1963. A petition for rehearing was denied on May 3, 1963. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule 11 of the Rules of Practice and Procedure.

(b) This petition for certiorari is being filed in this case within 30 days from the date of the judgment denying the petition for rehearing.

(c) The nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions are substantial are as follows:

(1) The United States Court of Appeals for the Fifth Circuit has permitted a conviction to stand in a criminal case where the Court tacitly admits the evidence for the Government is not sufficient to prove a violation of the statute, and where a proper motion for a judgment of acquittal was made at the conclusion of the evidence for the government.

(2) The precedent set in this case by the United States Court of Appeals will permit a conviction to stand in a criminal case where there has been no evidence of

fered to prove a prima facie case, and will place the burden of proof on the defendant to disprove his guilt.

THE QUESTIONS PRESENTED

1. Where an accused person in federal court is charged with a substantive sale and a conspiracy to sell narcotics "not in pursuance of a written order of the person to whom such article is sold on a form to be issued in blank for that purpose by the Secretary or his delegate," and the government completely fails to prove this section of the statute was violated, and the accused, through his counsel, makes a motion for a judgment of acquittal at the conclusion of the evidence for the government on the ground that there "is not competent and sufficient legal evidence to go to the jury," can such a conviction legally stand?

2. In such a prosecution for such statute, is the burden of proof upon the defendant to prove that the sale of such narcotics was in pursuance of a proper order form?

3. Does the case of *Blockburger* v. *United States*, 284 U.S. 299, on page 302, require the government to prove this element of the statute in order to justify or authorize a valid conviction?

4. Is the case of *United States* v. *Johnson*, 235 Fed. 2nd, 159, decided by the United States Court of Appeals for the Seventh Circuit, holding and deciding that "the proof necessary to sustain a conviction on one count would not be sufficient as to the other," in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in this case allowing a conviction to stand without evidence to prove "the qualifying requirement" of the statute?

STATUTES INVOLVED

Title 26, U.S.C.A. Section 4705. (a):

> "It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

APPENDIX

Petitioner herein appends to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfuly submitted,

WESLEY R. ASINOF
Attorney for Petitioner
419 Atlanta National Building
Atlanta 3, Georgia

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19875

VERNON GRANT

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for the Northern District of Georgia

---

(March 29, 1963)

Before TUTTLE, Chief Judge, WOODBURY*, Chief Judge, and BELL, Circuit Judge.

PER CURIAM: The only ground of appeal here is that the government witness in a prosecution for the illegal sale of narcotics did not testify correctly with respect to the government form to be used in the event of a legal sale.[1]

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*Chief Judge of the First Circuit, sitting by designation.

[1]Section 4705 of Title 26 U.S.C.A. makes criminal the sale of narcotic drugs "except in pursuance of a written order of the person to whom such article is sold . . . on a form to be issued in blank for that purpose by the secretary or his delegate."

Upon the trial of this case, after it was proved that Appellant sold a quantity of morphine to the witness Jessup, the question was asked: "Now when you obtained this bottle from Vernon Grant and Harold Johnson did you give them an order signed by the Secretary of the Treasury or his delegate?" This question was answered in the negative.

No objection was made by the Appellant at the time of the trial to the form of the question. Moreover, no motion was made at the conclusion of the entire trial for a verdict of acquittal on a basis of the failure of the government to introduce evidence sufficient to carry the case to the jury. Thus the trial court was given no opportunity to examine this particular criticism as to the form of the question. We are convinced that no substantial injustice resulted from the form of the question, and therefore we do not consider that the point should be the basis of reversal by this Court in the absence of a failure to make a timely motion in the trial court.[2]

The judgment is

AFFIRMED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk
U. S. Court of Appeals, Fifth Circuit
By Clara R. James
Deputy
New Orleans, Louisiana
May 20, 1963

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[2]We think it only appropriate to comment that different counsel tried the case than counsel who appear before this Court on appeal.

Adm. Office, U. S. Courts—Scofields' Quality Ptrs., Inc., N. O., La.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19875

D. C. Docket No. 22,746 Cr.

VERNON GRANT

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for the Northern District of Georgia

---

Before TUTTLE, Chief Judge, WOODBURY*, Chief Judge, and BELL, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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*Chief Judge of the First Circuit, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 29, 1963

Issued as Mandate:

Filed May 3, 1963, U.S. Court of Appeals
EDWARD W. WADSWORTH, *Clerk*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19875

VERNON GRANT,

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court for the Northern District of Georgia

---

(May 3, 1963)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, WOODBURY*, Chief Judge, and BELL, Circuit Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

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*Chief Judge of the First Circuit, sitting by designation.

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No. 184

In the Supreme Court of the United States

OCTOBER TERM, 1963

VERNON GRANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 184

VERNON GRANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7–8) is reported at 315 F. 2d 395.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1963. A petition for rehearing was denied on May 3, 1963. The petition for a writ of certiorari was filed on June 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the proof was adequate to show that petitioner conspired to sell and did make a sale of narcotics without the prescribed order form.

STATUTE INVOLVED

Section 4705(a) of Title 26 provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

STATEMENT

Petitioner and one Johnson were convicted in the United States District Court for the Northern District of Georgia of conspiring to sell narcotics without a written order form in violation of 26 U.S.C. 4705(a) and of the substantive offense of selling without such order form. Petitioner was sentenced to concurrent terms of imprisonment for five years. The conviction was affirmed on appeal.

The evidence showed that a government agent was introduced to Johnson as a prospective buyer of narcotics (R. 19, 60). Johnson said that he did not personally have the narcotics to sell, but that it was his function to locate a buyer for someone who had them (R. 19, 30). Johnson introduced the agent to petitioner who offered an assortment of morphine, codeine and pantopon tablets for $5,000. The agent agreed to buy $500 worth of morphine (R. 19). The sale was consummated the following day (R. 27, 47–48). The agent was asked and answered in the negative, without objection, the following question (R. 30):

Q. Now, when you obtained this bottle from Vernon Grant and Harold Johnson, did you give them an order signed by the Secretary of the Treasury or his delegate?

ARGUMENT

The sole contention is that the evidence does not support the verdict, because the agent was asked only whether he had given the defendants an order signed by the Secretary. The statute (26 U.S.C. 4705 (f)) requires that before issuing any order form "the Secretary or his delegate shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same." It was evident from the total circumstances of this case that there was never any intention among the parties that there be a sale pursuant to an order. It has been held, under such circumstances, that the government is not required specifically to prove the absence of an order form to establish a violation of the statute. *Chin Gum* v. *United States*, 149 F. 2d 575 (C.A. 1). In any event, the evidence plainly was sufficient to sustain the conspiracy count (which will alone support the verdict), since a completed sale is not necessary to establish a conspiracy to sell narcotics without the prescribed order form. *Martinez* v. *United States*, 25 F. 2d 302 (C.A. 5).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JUNE 1963.

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